stated in his affidavit. In *Halsbury's* Laws of England 4th Edition Vol. 3 paragraph 1179, the following passage appears: "When counsel appears in court and states that he is instructed, the Court will not inquire into his authority to appear, ..." In any event, if the learned President had any doubt as to the authority or instructions of Mr. Teng to appear, he should have taken such action as inquiring into the matter or suspending the proceedings until he was satisfied of the position of Mr. Teng. If such a course was taken, the position or authority of Mr. Teng would have been clear.

For the above reasons, the motion is allowed. There shall be an order that the order of the learned President made on July 29, 1983 whereby the action Summons No. 5B/21/83 was dismissed be removed into this Court and thereupon be quashed. I further order that the said action be remitted to the said Sessions Court for it to be dealt in accordance with law.

Motion allowed.

Solicitors: *Thomas & Co.*

DAVID ANTHONY v. PUBLIC PROSECUTOR

[O. Cr. J. (Gunn Chit Tuan J.) July 9, September 25 & October 15, 1984]

[Kuala Lumpur – Selangor Criminal Application No. 1 of 1984]

Administrative Law – Bias – Principal witness refused by magistrate to give evidence as she was in open court during prosecution's case – Application for case to be tried de novo by another magistrate – Test applied by court – Whether there was "a real likelihood of bias" on the magistrate's part.

Evidence – Principal witness refused by magistrate to give evidence as she was in open court during prosecution's case – Whether there was "a real likelihood of bias".

The applicant was charged on March 3, 1982 for criminal intimidation under section 506 of the Penal Code in Kelang Magistrate's court. He applied for an order that his case be tried *de novo* by another magistrate. In support of his application he claimed that when his principal witness, one Miss V. N. Verny, was called to the witness stand by his counsel and entered the court, the magistrate on her own motion stated that that witness had already finished giving evidence. But when the said witness protested that she had not yet given her evidence the magistrate changed her words to the effect that that witness was in court throughout the prosecution's case and also during the recording of the evidence of the first defence witness.

The Public Prosecutor in opposing the application relied on an affidavit of Woman Inspector Hazmi bte. Baharudin who was the prosecuting officer in that case. In an affidavit affirmed by the said woman inspector on August 1, 1984, she denied the above allegation of the applicant and stated that the magistrate merely said that the witness Miss V. N. Verny was present in open court during the prosecution's case.

Miss V. N. Verny had also written a letter to the learned Chief Justice on November 8, 1983 (Exhibit DA1 attached to the affidavit of the applicant dated June 21, 1984) in which she alleged that the magistrate had said "You were in open court when the first defence witness and during the time the prosecution witnesses were giving evidence", and after a denial by her the magistrate shouted angrily "Don't deny, you are a liar, you don't lie". The magistrate in a letter to the Chief Justice on November 30, 1983, stated that she did not deny that she had said, "You must tell the truth, don't tell lies here (Court)".

The applicant claimed that Miss V.N. Verny was a key-witness for the defence and he feared that her evidence might not be dispassionately evaluated by the said magistrate and that there might be a miscarriage of justice.

Held, allowing the application: (1) the test to be applied by magistrates is whether in the circumstances there would be the appearance of bias on their part, rather than actual bias, if they proceed to hear the case;

(2) if reasonable and fair-minded persons sitting in the Kelang Magistrate's court and following the proceedings, might question or doubt the fairness of the trial and think that there was a real likelihood of bias, and might go away thinking "The magistrate was biased", then it would be preferable in the circumstances that the magistrate concerned should not sit further to hear the case;

(3) this case should therefore be tried *de novo* before another magistrate in the Kelang Magistrate's court.

Cases referred to:

(1) *Maleb bin Su* v. *Public Prosecutor* [1984] 1 M.L.J. 311, 312.

(2) *Cooper* v. *Wilson & Ors.* [1937] 2 K.B. 309, 345 to 347.

(3) *Law* v. *Chartered Institute of Patent Agents* [1919] 2 Ch. 276, 290.

(4) *R.* v. *Altrincham Justices* [1975] 1 Q.B. 549, 552.

(5) *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259.

(6) *R.* v. *Liverpool City Justices, Ex parte Topping* [1983] 1 All E.R. 490, 494.

(7) *Metropolitan Properties Co. (FGC) Ltd.* v. *Lannon* [1969] 1 Q.B. 577, 599.

(8) *Manokaran & Anor.* v. *Public Prosecutor* [1979] 1 M.L.J. 262, 263.

CRIMINAL APPLICATION.

Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

M.S. Murthi for the applicant.

Cur. Adv. Vult.

Gunn Chit Tuan J. : The applicant, who was charged on March 3, 1982, for criminal intimidation under section 506 of the Penal Code in the Kelang Magistrate's Court, applied by notice of motion on July 19, 1984, for an order that his case being Kelang Magistrate's Court Arrest case No. MA 341/81 be transferred to the Kuala Lumpur Magistrate's Court or to any other Magistrate's Court in the State of Selangor. He also asked for an order that his aforesaid case be tried *de novo* by the Kuala Lumpur Magistrate's Court or by any other Magistrate's Court designated by the High Court. In an affidavit affirmed on June 26, 1984, the applicant stated that on September 28, 1983, during the continued hearing of his case his principal witness, one Miss V.N. Verny, was called to the witness stand by his counsel. When the witness entered the Court the magistrate on her own motion stated that that witness had already finished giving evidence. But when the said witness protested that she had not yet given her evidence the magistrate changed her words to the effect that that witness was in court throughout the prosecution's case and also during the recording of the evidence of the first defence witness.

The Public Prosecutor in opposing the application relied on an affidavit of Woman Inspector Hazmi bte. Baharudin who was the prosecution officer in that case. In an affidavit affirmed by the said women inspector on August 1, 1984, she denied the above allegation of the applicant and stated that the magistrate merely said that the witness Miss V.N. Verny was present in open court during the prosecution's case.

Miss V.N. Verny had also written a letter to the learned Chief Justice on November 8, 1983 (Exhibit DA1 attached to the affidavit of the applicant dated June 21, 1984) in which she alleged that the magistrate had said "You were in open court when the first defence witness and during the time the prosecution witnesses were giving evidence", and after a denial by her the magistrate shouted angrily "Don't deny, you are a liar, you don't lie". The magistrate in a letter to the learned Chief Justice on November 29, 1983, stated that she did not deny that she had said "You must tell the truth, don't tell lies here (Court)".

According to the application, Miss V.N. Verny is a key witness for the defence and he feared that her evidence might not be dispassionately evaluated by the said magistrate and that there might be a miscarriage of justice. His counsel, Mr. M.S. Murthi, submitted that the magistrate was biased and drew my attention to the record of the court below in which the magistrate had written the word "rubbish" once and the word "demeanour" three times in the marginal column where she had recorded the evidence of Miss Verny. Counsel stated that the magistrate was perfectly entitled to observe the demeanour of that witness but raised the question as to why she had not made any notes regarding her observation of the demeanour of all the other witnesses and submitted further that there was therefore a possibility of bias on her part. He referred to the following provisions of section 271 of the Criminal Procedure Code (F.M.S. Cap. 6) regarding remarks as to the demeanour of a witness:-

> "A presiding Magistrate recording the evidence of a witness may, at the conclusion of such evidence and at the foot of the notes thereof, record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination."

According to *Mallal's* Criminal Procedure (4th. Edition) at page 408 the object of an equivalent section in the Singapore Criminal Procedure Code is to assist the appellate court in estimating the value to be attached to the evidence of witnesses recorded by the inferior court. The appellate court will have no opportunity to observe the look or manner of a witness, his hesitation, his doubts, his variations of language or his precipitancy, his calmness or consideration. However, in so far as this case was concerned, the magistrate did not record her remarks as to the demeanour of Miss V.N. Verny at the conclusion of her evidence and at the foot of the notes thereof nor, as pointed out by learned counsel, had she recorded any remarks regarding the demeanour of all the other witnesses. It was therefore the contention of counsel that the magistrate appeared to think that Miss Verny was unworthy of credit and he pointed out that an application to the magistrate to disqualify herself and to fix the hearing before another magistrate was dismissed by her on May 30, 1984. Counsel also pointed out that the magistrate did not indicate and assure the applicant that she

would be impartial and not be biased as the learned President did in a recent Seremban Session's Court case (see judgment of Hashim Yeop A. Sani F.J. in *Maleb Su* v. *Public Prosecutor*[1]).

On the likelihood of bias, Mr. Murthi referred me to *Cooper* v. *Wilson and Others*[2]. In that case the appellant, a sergeant in the Liverpool police force handed in a month's notice of resignation. He was charged for offences against discipline and the Chief Constable, after an inquiry, purported to dismiss him. Later the Watch Committee at a meeting, at which the Chief Constable was present during the deliberations, purported to dismiss the appellant's appeal from the Chief Constable's sentence of dismissal. The Watch Committee thereupon refused to pay him his accumulated rateable deductions from his pay to which he claimed to be entitled under the Police Pensions Act, 1921. He then sued the Chief Constable and the Watch Committee claiming declarations that he had duly resigned, and was therefore entitled to be repaid the rateable deductions that had been made from his pay. The U.K. Court of Appeal in that case expressed the opinion that the proceedings before the Watch Committee were contrary to natural justice owing to the presence of the Chief Constable during the Committee's deliberations on the appellant's appeal, and we find the following passages in the judgment of Scott L.J. to which counsel has drawn my attention:–

"A third ground for impugning the hearing before the Watch Committee on which the appellant relied in the argument before us was that the conduct of the trial was inconsistent with "natural justice" in respect of two incidents. The first was that the chairman, as found by the jury, interrupted the appellant in the course of his evidence and said that he was lying.

I do not doubt that a judge may express his disbelief in a witness altogether, or in respect of a particular piece of evidence; but I do not think the occasion or manner of the chairman's intervention was justified. It tended to shut out a possible defence, and the impression left on my mind is that the disbelief in the honesty of the appellant's evidence was to say the least premature. ...

The other incident, also found as a fact by the jury, was that the chairman refused to allowed *(sic)* the appellant to call Mrs. Gray as a witness. ...

Taking both these incidents together I arrive at the conclusion that they are sufficient to show a failure to give the appellant a fair trial. ....."

In his judgment Scott L.J. also referred to and agreed with the views of Eve J. in the following passage of His Lordship's judgment in *Law* v. *Chartered Institute of Patent Agents*[3]:-

"a person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias."

Counsel also submitted that the burden of proving bias is to be found in the following test laid down by Lord Widgery C.J. in *Regina* v. *Altrincham Justices*[4]:-

"When an application is made to set aside a decision on the ground of bias, it is of course not necessary to prove that the judicial officer in question was biased. It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment to which I have referred."

So far as bias was concerned, counsel stated that it was not alleged that there was actual bias on the part of the magistrate. But he said that there was, albeit unconscious, a real likelihood of bias. I would agree that for maintaining confidence in the administration of justice one must remind oneself of the oft-repeated saying of Lord Hewart C.J. in *Rex* v. *Sussex Justices, Ex parte McCarthy*[5], that:-

"It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In this case we were fortunately not concerned with actual bias on the part of the learned magistrate; but in any case the test to be applied by magistrates is whether in the circumstances there would be the appearance of bias on their part, rather than actual bias, if they proceeded to hear the case. Thus in the very recent U.K. case of *R.* v. *Liverpool City Justices, Ex parte Topping*[6], the Queen's Bench Division in a judgment delivered by Ackner L.J. said that in their view, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias. His Lordship referred to the following passage in the judgment of Lord Denning M.R. in *Metropolitan Properties Co. (FGC) Ltd.* v. *Lannon*[7]:-

" ..... in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, never-

theless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. ..... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think, he did. The reason is plain enough. Justice might be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.' "

Applying the above test in considering whether there is a likelihood of bias in this case, I considered that in view of what has transpired since September 1983, the impression which might be created, to use the words of Abdoolcader J. (as he then was) in the Penang case of *Manokaran and Another* v. *Public Prosecutor*[8], "in the mind of the disinterested man or woman on the Jelutong omnibus", or if I might add, if reasonable and fair-minded persons sitting in the Kelang Magistrate's Court and following the proceedings, might question or doubt the fariness of the trial and think that there was a real likelihood of bias, and might go away thinking "The magistrate was biased", then it would be preferable in the circumstances that the magistrate concerned should not sit further to hear the case. Although the learned deputy pointed out that twenty days have been taken up so far in the hearing of this case, yet I think some loss of judicial time would not be too high a price to pay in order to maintain confidence in the administration of justice in this country. In all the circumstances of the case, I therefore allowed the application and ordered that the case be tried *de novo* before another magistrate in the Kelang Magistrate's Court.

Application allowed.

Solicitors: *Syarikat Davidason.*

NG SONG LUAK v. PUBLIC PROSECUTOR

[A.Cr.J. (Yusoff Mohamed J.) October 31 & November 10, 1984]
[Johore Bahru – Criminal Appeal No. 15 of 1982]

Criminal Law & Procedure – Charge – Defective charge – Whether facts of case support charge of conspiracy – Penal Code (F.M.S. Cap. 45), ss. 120A & 120B.

Penal Code, ss. 120A & 120B – Robbery – Charge – Defective.

This was an appeal from the conviction and sentence by the learned President of the Sessions Court on a plea of guilty by the accused.

The records showed that,

(1) the written facts of the case submitted to the learned President upon the accused pleading guilty to the charge, were not read and explained to the appellant as they should have been;

(2) that the learned President had himself not read or examined the facts of the case to see whether they were conformable with the law and in support of the charge.

Held: allowing the appeal: (1) it was clear from the recorded facts that both the dates and the facts of the case did not support the charge of conspiracy;

(2) even if the defective charge was not fatal and did not amount to a failure of justice there were too many other unsatisfactory features in this case which if allowed uncorrected would have caused injustice to the appellant who was then not represented by counsel.

Cases referred to:

(1) *Public Prosecutor* v. *Leong Yoon Meow* [1953] M.L.J. xxxv.

(2) *Abdul Salam* v. *Public Prosecutor* [1955] M.L.J. 116.

CRIMINAL APPEAL.

R.K. Menon for the appellant.

Chua Ming Hung (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yusoff Mohamed J.: The appellant pleaded guilty to a charge under section 120 B of the Penal Code and was sentenced to five years' imprisonment.

The charge reads: –

"That Liew Yoon Choy and Ho Chee Kuan on October 11, 1980 at about 10.15 a.m. at Chai Seng Goldsmith No. 106, Jalan Trus, in the district of Johor Bahru, in the State of Johor, committed the offence of armed robbery under section 392/397 Penal Code, and that you on the same day and time at Jalan Trus, Johor Bahru conspired with the said persons Liew Yoon Choy and Ho Chee Kuan, as a result of your conspiracy the said offence was completed, and that you have thereby committed an offence punishable under section 392/397 Penal Code, to read together with section 120B of the Penal Code."

It is apparent that the charge does not follow the definition of the offence of conspiracy as defined under section 120A of the Penal Code. The section defines criminal conspiracy as two or more